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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34151

TIMBERLINE FOUR SEASONS  
RESORT MANAGEMENT CO., INC.,  
and LONG RUN REALTY, INC.,

Petitioners Below, Appellants

Civil Action No. 07-C-44  
Circuit Court of Tucker County  
Andrew N. Frye, Jr., Judge

v.

PAT J. HERLAN, individually,  
TIMBERLINE REALTY, INC., and  
TIMBERLINE RESORT REALTY, INC.,

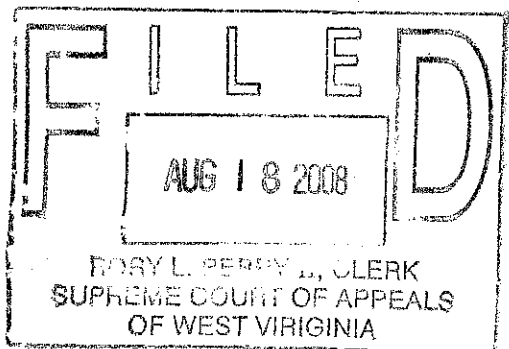
Respondents Below, Appellees.

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FROM THE CIRCUIT COURT OF  
TUCKER COUNTY, WEST VIRGINIA

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**APPELLEES' ~~REPLY~~ BRIEF**



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August 15, 2008

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## OMISSIONS AND INACCURACIES IN APPELLANT'S PRESENTATION

Appellant, in its identification of the parties, and in the fifth paragraph of its "Facts," omits the fact that until 2000, Pat J. Herlan ("Herlan") operated her real estate brokerage business as a sole proprietorship, until 2002 when she and another broker formed a partnership which operated the same business. During the seven years immediately preceding the eviction in January of 2007, Herlan and her partner, Murray Dearborn, operated as Timberline Resort Realty, a general partnership. (Tr. 73, 92)

In Appellant's "Facts," the third paragraph speaks of the real estate division of Timberline Four Seasons Resort Management, Co., Inc. In fact, that corporation never had a real estate division until after the hearing in this case. As explained hereinafter, from 1991 through June, 2007, it would have been unlawful for Timberline Four Seasons Management Co., Inc. to have operated a real estate brokerage as no owner or officer of the corporation was a licensed real estate broker. (Argument, *infra*.)

In the fourth paragraph of Appellant's "Facts," it is stated that Herlan was employed by Timberline Four Seasons Resort Management Co., Inc., under a written contract from her initial hiring in 1991 until 1996. It is accurate that she was first hired in 1991; however, the only two years that there was a written contract were 1995 and 1996. (Tr. 41, 54)

Appellant, in the penultimate paragraph of the "Facts," states that Herlan "stole" records from the brokerage business, including the information from the computer

software program. As these were records of the brokerage, viz., sales listing agreements, vacation home rental contracts, future reservation lists, and her trust account, all of which are required to be kept by her as the broker, it cannot be rationally asserted that she "stole" those records. In fact, it would have been unlawful for her to have delivered any of those items to Timberline Four Seasons Resort Management Co., Inc., or to Long Run Realty, Inc., as neither of those entities had any individual, owner, officer or otherwise, who was a licensed real estate broker. (Argument, *infra*.)

#### RESPONSE TO APPELLANT'S ALLEGED ERRORS

1. Because Appellee Pat J. Herlan was not an employee of Appellant Timberline Four Seasons Management Co., Inc., in her capacity as a real estate broker, the Circuit Court correctly ruled, based upon the facts, that no agency relationship existed. Furthermore, and because it would have been unlawful for Timberline Four Seasons Management Co., Inc., to operate a real estate brokerage without the broker being either an owner or officer of said corporation, the Circuit Court correctly ruled that no agency relationship could have legally existed.

2. In making the findings described above, the Circuit Court correctly interpreted W.Va. C.R. §30-40-12.

3. Telephone number 304-866-4777 was inactive in 1991 when Herlan moved her real estate business into the Roundhouse which she rented from Timberline Four Seasons

Resort Management Co., Inc., because it had failed to pay the bill. That number was re-activated in her name only after Herlan used her own social security number and credit card to secure future payments. All other telephone numbers of Timberline Resort Realty were acquired later in the normal course of business. Thus, all telephone numbers belong to Herlan's brokerage.

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## ARGUMENT

Pat J. Herlan ("Herlan") began working for Timberline Four Seasons Resort, Management, Co., Inc. ("Timberline Four Seasons"), in 1991 without a written contract. She received a salary for her promotional work for the resort and for her liaison between the resort and independent developers of resort real estate. (Tr. 56) At the same time, she operated a real estate sales and rental business as a licensed broker out of the Roundhouse, a property which she rented from Timberline Four Seasons. This working arrangement continued during the two years that a written contract existed between the parties from May 1994 through April of 1996, and thereafter, until January of 2007 when Dr. Frederick Reichle ("Reichle"), on behalf of Timberline Four Seasons terminated that relationship. His termination letter, dated January 3, 2007 (Respondent's Exhibit 4), demanded that Herlan turn over all of her brokerage business, books and records to another real estate brokerage, wholly owned by Timberline Four Seasons. Because Dr. Reichle lacked authority to make such a demand, Herlan relocated her brokerage elsewhere.

In actuality, the real estate brokerage which had been operating for those many years out of the Roundhouse had changed in 2000 from a sole proprietorship for which Herlan served as broker, to a general partnership for which she again served as broker and Murray Dearborn served as associate broker (Tr. 92). The licenses issued to her annually by the West Virginia Real Estate Commission were issued in the name of Pat J. Herlan, dba Timberline Resort Realty (Tr. 92). As a general partnership, Timberline Resort Realty was

wholly separate and apart from Timberline Four Seasons. Quite simply, because neither Herlan nor Dearborn were owners or officers of Timberline Four Seasons, they could not have been brokers for that corporation; likewise, Timberline Four Seasons, not having a licensed real estate broker as an owner or officer, could not have been engaged in the business of a real estate brokerage.

Appellant asserts in its argument that "[a]t trial there was no dispute that Ms. Herlan was paid for her services as a real estate broker." Nothing could be further from the truth. Herlan asserted time and again, both through cross-examination of Appellant's witnesses and in her own testimony, that she was paid by Timberline Four Seasons for her promotional work, and not for any service as a broker. (Tr. 22, 54-57, 66) That distinction, which is the crux of this case, has been lost upon Appellant. Herlan's business as a real estate broker was operated separately from Timberline Four Seasons Resort Management Co., Inc., and it would have been unlawful for it to have been operated otherwise.

The income which Herlan received from Timberline Four Seasons was, as reflected on the W-2 forms, income which was attributed to her personally. It was not paid to the partnership, i.e., the brokerage. Her partner in Timberline Resort Realty, Murray Dearborn, did not receive a W-2 as none of that money was income to him. (Tr. 58) It was, as stated above, money paid to Herlan for her services as a promoter and liaison for the resort, not for any work performed by the brokerage.



There are other indications that Timberline Four Seasons did not own, manage or control Herlan or Timberline Resort Realty. Timberline Four Seasons did not provide Herlan or Timberline Resort Realty with exclusive listing rights for any of its real estate development projects. Timberline Four Seasons did not fund the real estate business. (Tr.93) In order to fairly compete with all other real estate brokerage firms in Canaan Valley for sales on the resort properties, Timberline Resort Realty has always paid for its own advertising, as much as \$250,000 per year. (Tr. 57, 93) Timberline Resort Realty was merely a tenant of Timberline Four Seasons and enjoyed a symbiotic relationship with it. Dr. Reichle got greedy, however, and in 2007 tried to take over the brokerage business.

Ignoring the clear fact that Timberline Resort Realty was not owned by him, Dr. Reichle demanded that all of the sales listing agreements signed by individuals with the brokerage for the sale of their properties, and all rental contracts signed by homeowners for the rental of their vacation homes, be turned over by Herlan to his newly formed company, Long Run Realty, Inc. Dr. Reichle had no right to those contracts to which neither he nor his corporation were a party. Also, as Long Run Realty, Inc., had no broker during the six months from the time of Dr. Reichle's demand in January of 2007 through the date of the hearing in this matter, it was not licensed to conduct a real estate business and could not have accepted the listing agreements or rental contracts even if there had been some obligation for them to be transferred. (Tr. 22)

Timberline Resort Realty vacated the Roundhouse as requested, by June 30, 2007, leaving all furnishings and computers. From those computers, however, Herlan had removed the Property Plus software which contained all of the brokerage's proprietary information, primarily relating to the management of the vacation home rental business. (Tr. 68-70) It was this software which tracked each unit's availability, reservations, deposits and final payments, as well as the split of the receipts to pay hotel/motel tax, cleaning staff, commissions, and the balance to the homeowner. Not only would historical information be contained therein, but many future reservations for the up-coming year. Deposits had been received into a trust account. Homeowners and vacationers who had entered into contracts through Timberline Resort Realty would expect those contracts to be honored, and only a licensed real estate broker is permitted by law to engage in a business of renting properties which it does not own. In place of the data-filled Property Plus software which she removed, Herlan left, at a cost to her, of \$19,750.00, a new Property Plus software program, for the next brokerage which would occupy the Roundhouse. (Tr. 96)

Timberline Four Seasons, believing that Timberline Resort Realty should have left all of its sales listing agreements, vacation home rental contracts, financial records and future reservations, as well as its telephone lines and numbers, for a successor entity, sought injunctive relief.

Even if there were a factual basis to Appellant's claims that Herlan was in the employ of Timberline Four Seasons and, thus, its agent in the brokerage business, this theory

must also fail as a matter of law. As Dr. Reichle, the owner of Timberline Four Seasons and his General Manager, Tom Blanz, insisted, Herlan was never an owner or officer of Timberline Four Seasons. (Tr. 18, 44, 45 and 61) Therefore, pursuant to West Virginia law, Timberline Four Seasons could not have conducted the business of a real estate brokerage. Until 2002, West Virginia Code, §47-12-1 mandated that

it shall be unlawful for any person, partnership, association or corporation to engage in or carry on, directly or indirectly, or to advertise or hold himself, itself or themselves out as engaging in or carrying on the business or act in the capacity of a real estate broker or a real estate salesman within this State, without first obtaining a license as a real estate broker or real estate salesman as provided for in this article.

Also, West Virginia Code, § 47-12-4 provided that,

No broker's license shall be issued to a partnership, association or corporation unless each member or officer thereof who will actively engage in the real estate business be licensed as a real estate salesman or associate broker, when and after said broker shall have been granted a broker's license.

In 2002, the West Virginia Legislature recodified the foregoing into West Virginia Code, §30-40-12, which provides in subsections (b) and (c) as follows:

(b) No broker's license shall be issued in the name of a corporation, association or partnership except through one of its members or officers.

(c) No broker's license shall be issued in the name of a corporation, association or partnership unless each member or officer, who will engage in the real estate business, obtains a license as a real estate salesperson or associate broker.

It is clear that a real estate broker cannot perform brokerage services for a corporation unless that broker is either an owner or an officer of the corporation. Even though 16 years ago, Herlan advised both the principal owner and the general manager of Timberline Four Seasons, that she could not provide brokerage services as an employee of their corporation unless she was an owner or officer, they rejected any thought of the same. (Tr. 72) For that reason, she operated her brokerage business outside the aegis of Timberline Four Seasons, first as a sole proprietorship and, later, as a partnership. Now, even though it would have been illegal for her to have done so, Timberline Four Seasons asserts that Herlan was a non-owner, non-officer employee acting as a broker for the corporation. Appellant couldn't be more wrong.

For many years, the Timberline resort has struggled financially, often searching for the funds necessary to open the winter ski operations. Knowing that her real estate sales and rental business depended upon the continued operations of the resort, Herlan loaned money to Dr. Reichle on several occasions in furtherance of the aforementioned symbiotic relationship. (Tr. 59, 65) Nevertheless, these financial squeezes hurt Timberline's reputation in the community, and were but one reason that Herlan was paid for being a promoter and advocate locally for the resort.

When Herlan commenced the brokerage business at the Roundhouse, she found that the telephone was no longer in service, the phone bill having not been paid. (Tr. 62) In order to re-institute service, she had to provide her social security number for the account

and secure payment of the account with her credit card. (Tr. 88) Thus, telephone number 304-866-4777 was placed in her name, and was, in the spring of 2007, in the name of Timberline Resort Realty. Over the years, several other telephone and facsimile numbers have been obtained, all in the name of Herlan or the brokerage.

Inasmuch as most real estate sales listings agreements and vacation home rental listing agreements are valid for one year or less, it would appear that today, more than a year after this dispute arose, none of the contracts which were in existence at that time would still be valid. Thus, this appeal may now involve nothing more than which entity is entitled to telephone number 304-866-4777.

### CONCLUSION

Appellant's claims, based entirely upon an agency theory, must fail. While Herlan had personally been an employee of Timberline Four Seasons as a paid promoter for the resort until January of 2007, neither Herlan nor the brokerage partnership of Timberline Resort Realty had been an agent of Timberline Four Seasons since at least 1996. If the W-2 wages which Herlan received from Timberline Four Seasons had been for her real estate brokerage services, that income would have been partnership income and Murray Dearborn would also have received W-2 wages; he did not. (Tr. 58) The brokerage rented office space from Timberline Four Seasons. (Tr. 35) The brokerage did not have exclusive listings on resort properties. Commissions earned by the brokers were their sole source of income (Tr. 58), with

sufficient funds being provided to Timberline Four Seasons so that it could perform its function as a payroll service. Timberline Resort Realty paid for its own advertising, approximately \$250,000 annually. (Tr. 93) It received no funding from Timberline Four Seasons. (Tr. 93) Timberline Resort Realty was owned by partners, Pat J. Herlan and Murray Dearborn. Timberline Resort Realty was not owned or controlled by Timberline Four Seasons, and, thus, Pat J. Herlan was not an agent of Timberline Four Seasons in her capacity as a real estate broker.

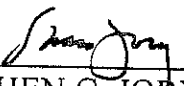
The ruling of the Circuit Court of Tucker County should be affirmed.

Respectfully submitted this the 15<sup>th</sup> day of August, 2008.

PAT J. HERLAN, individually,  
TIMBERLINE REALTY, INC., and  
TIMBERLINE RESORT REALTY, INC.,

Respondents/Appellees

By counsel

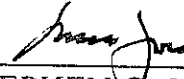
  
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**CERTIFICATE OF SERVICE**

I, Stephen G. Jory, counsel for record for Respondents, do hereby certify that on this date I served a true copy of the attached **APPELLEES REPLY BRIEF**, upon John J. Wallace, IV and Joseph A. Wallace, by depositing true copies of the same in the United States Mail, with sufficient postage attached thereto , addressed as follows:

John J. Wallace, IV, Esquire  
Joseph A. Wallace, Esquire  
P.O. Box 7  
Elkins, WV 26241

Dated at Elkins, West Virginia, this the 15<sup>th</sup> day of August, 2008.

  
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